

# ***GRAMA and the Open and Public Meetings Act: Practice Tips and Pointers***

Utah Prosecution Council  
*Training for Newly Elected County Attorneys*  
January 21, 2015

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# GRAMA & Open Meetings First Principles

- Government Records Access & Management Act (“GRAMA”), Utah Code § 63G-2-101, et seq.
- Open and Public Meetings Act, Utah Code § 52-4-101, et seq.
- Sunshine laws are fundamental to self government
- Sunshine laws are a balancing act
- The public cares a lot about sunshine laws

# First Principles

- Sunshine laws are fundamental to self government
  - Transparency
  - Empowerment
  - Accountability
  - Public trust



# First Principles

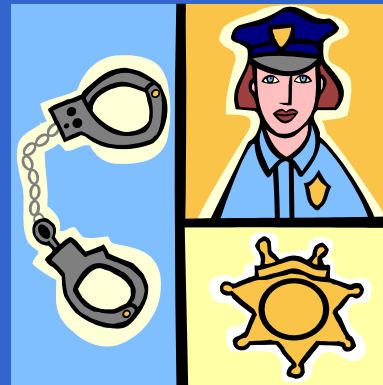
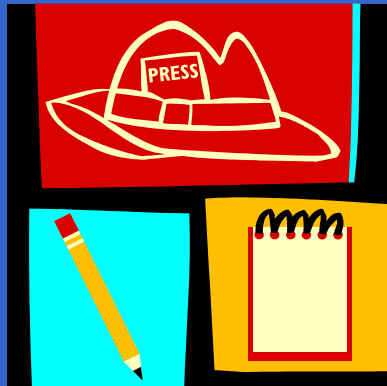
- *“People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”*

*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 2825 (1980)

- *“Openness safeguards our democratic institutions. Secrecy breeds mistrust and abuse.”*
  - *United States District Judge David K. Winder*
  - *Soc’y of Prof’l Journalists v. Sec’y of Labor*, 616 F. Supp. 569, 576 (D. Utah 1985)

# First Principles

- GRAMA and the Open Meetings Act reflect a balance of competing interests:
  - Public access and accountability vs. privacy, commercial, public safety, government process, and other interests



# First Principles

- Legislative intent:
  - Open Meetings Act:
    - *“It is the intent of the Legislature that the state, its agencies, and its political subdivisions: take their actions openly; and conduct their deliberations openly.”* (Utah Code § 52-4-102(2))
  - GRAMA: It is the intent of the Legislature to:
    - *“Promote the public’s right of easy and reasonable access to unrestricted public records;”* and
    - *specify those conditions under which public access may be restricted.*

# First Principles:

## The public cares about its sunshine laws



-- a lot !



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# The Salt Lake Tribune

MARCH 5, 2011 « SATURDAY »

Sports » Record crowd sees Utes fall to No. 1 Florida, 197-196.75 • D1

## KEEPING IT CLOSE

WE HELP GUIDE YOU THROUGH THE STRESSFUL TAX SEASON » E1

### OUR VIEW

By the Tribune Editorial Board

### Herbert's choice

Is he for secrecy or accountability?

The last line of defense against a brazen assault on the people of Utah and their right to knowledgeably participate in their own government now lies in the office of Gov. Gary Herbert.

If the Republican governor is to retain any claim to being the governor of all the people, not the pawn of special interests and pandering to the right wing of his party, he must veto House Bill 477.

And if he does not use all the political pull at his disposal to persuade lawmakers to sustain that veto, the governor will never again be able to say that he is a champion of transparency in government.

He will be revealed as a political hack who is more concerned about preserving his own viability within the radical fringes that control the Republican nominating process in this state than he is about doing the people's business in the light of day.

In barely 48 hours, the GOP majority in the Utah Legislature announced, pretended to debate and passed a piece of legislation with the clear intent of gutting what was, for the past 20 years, a model law that assured the media and the people reasonable access to the public records that they own.

Legislative leaders bluntly admitted that their haste was intended to avoid public scrutiny and to dodge any rush of open-records requests that might come if people knew what they were up to.

HB477 would take Utah in exactly the wrong direction. No other state is even considering such action, which would only strengthen Utah's unenviable reputation as a backwater state, governed by cronies and cliques.

Under the bogus cover of protecting the privacy of individuals who communicate with their representatives, HB477 would carve out exemptions in the Government Records Access and Management Act — GRAMA. Most of those exemptions are designed to cloak the Legislature's own doings. It would also allow state and local government agencies to charge inflated fees and impose unreasonable delays, designed to frustrate all but the most determined — and well-funded — seekers of the truth.

Herbert is known to be uncomfortable with this bill, but fears that a veto could help trigger a challenge from the right when he seeks a new term in 2012.

We urge the governor to rise above politics, to act as the statesman voters elected him to be, and to veto this breathtakingly arrogant assault on the people's right to know.

HB477 » It would shield more records from public, OK charging more for access.

GRAMA » Amid loud media protests, Senate and House push it through quickly.

## Records bill gets a fast track, backlash



Sen. Gene Davis, D-Salt Lake City, explains his "no" vote on a bill that would change Utah's open-records law. The bill sailed through the Senate on Friday, just a day after it cleared the House. Gov. Gary Herbert says he'll "carefully consider" whether to sign it into law.



**Education: Will schools pass?**

The Senate rejected favorably to a bill that would require the Utah Office of Education to assign letter grades to schools. • B4



**Money: Coins of silver and gold**

The House passed a bill that would recognize as legal tender gold and silver coins issued by the federal government. • A4



**Legislators wrap work on controversial issue**

**IMMIGRATION** — The Legislature finished up its work on illegal immigration Friday, with both chambers passing Rep. Stephen Sandstrom's enforcement-only immigration bill and a guest-worker proposal. • B1

By LEE DAVIDSON

The Salt Lake Tribune

The Senate gave final legislative approval Friday to a bill that would shield more records from public release and allow charging more for records that are still available. It came just 72 hours after its text was unveiled, and despite loud protests from the news media.

The Senate voted 21-7 to pass HB477, and sent it to Gov. Gary Herbert — who vowed to "carefully consider" it and "weigh all factors" as he decides whether to sign it. The Legislature took the unusual step of having the bill take effect immediately upon the governor's signature, instead of waiting the normal 60 days.

Leaders said they did that — and

Photo by RECORDS, AS

### Did BYU choose right in case over honor code?

Ethics experts School had to follow rules in punishing hoops star.

By BROOKE ADAMS  
The Salt Lake Tribune

From *The Wall Street Journal* to "The Daily Show," it's the question still creating a buzz across the nation: Did Brigham Young University go too far when it punished star basketball player Brandon Davies for having premarital sex with his girlfriend?

Or, as Abby Jones, lead writer of the *Journal's* Law Blog, put it: Did BYU do the right thing "to behave so that right thing 'for behavior' that

Photo by HONOR CODE, A4



Mai Nguyen and her family are putting \$1.2M of their money into her restaurant.

### No loan in sight, Pho Green owner comes up with green

By PAMELA MANSON

The Salt Lake Tribune

**West Valley City** — Even though the Great Recession is lingering, Mai Nguyen is renovating her small restaurant, reception center and office building — and she's doing it on her own dime.

The restaurant is under a \$1.2 million remodeling of Pho Green. The other building on its site with no bank loan. Instead, she and family members are putting up the money.

"I went to four banks," said Nguyen, adding that she has never been late on

Photo by RESTAURANT, A6



Today » Mostly cloudy. • E6

Classified Ads	T1
Community	C1
Comics & Pulp	C4
Education	A10
Entertainment	C5
Money	E1
Obituaries	O1
Opinion	O2
Real Estate	R1
Sports	S1
Television	T2

VOL. 281 NO. 142



### Both sides are on the offensive

**LIBYA** — At least 37 people died Friday in fighting and in an explosion at an ammunition depot as the bloodshed signaled an escalation in efforts by both sides to break the deadlock that has gripped the nation during an 18-day upheaval. • A8



The most important thing to remember: Have fun. • B1

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# UTAH LEGISLATORS ARE TURNING THE LIGHTS OUT.



## ARE YOU GOING TO LET THEM?

Through a rushed process, legislators have proposed sweeping changes to Utah's premier sunshine law, the Government Records and Management Act, the state law that keeps Utahns informed about their government. Rather than subject the proposal to normal review, it was kept hidden until the last week of the Legislative session.

### Here's what the bill will bring:

**Secret government by text message.** This law would exempt all text messages from public records law, regardless of whether public officials are conducting official business. Government officials would be free to text each other during public meetings and make backroom deals over text messages with no fear of the deals being uncovered.

**Legislators get a pass.** This law creates a new standard for the Legislative branch that is more relaxed than the rest of government. It bars public access to records of a legislator's "official governmental duties." The sponsor, Rep. John Douglas, says they need to protect people who write to them with the expectation of privacy. But the same note written to the governor would not be exempt. Who are the legislators trying to protect, the letter writers or themselves?

**Public priced out of public information.** This law would allow government to charge prohibitive fees for access to public information. Government officials could tack on charges for indirect and administrative costs, allowing them to set rates that discourage citizens from seeking public information.

**Almost two decades of case law tossed out.** The bill removes legislative intent language that made clear that a government document is public unless the law says it isn't. That intent language has resulted in case law putting the burden of proof on government bureaucrats to say why a record should remain private. With this law, the public would have the burden of proving why it should be open.

**Government without the people.** At the only public hearing this legislation received at the Capitol Wednesday, no one from the public spoke in favor. Ten people representing news media and citizens groups spoke against it. Opponents pleaded with committee members to let the public join in crafting any changes, but they were ignored.

**Blaming others for the Legislature's gridlock.** The legislators say they were forced to act because they say 10 GRAMA requests have prevented their staffs from researching and preparing legislation. They say those requests are "fishing expeditions." What they don't say is that the staff is really bogged down because they are researching and writing bills that never even make it to the full legislature. Of the more than 1,000 bills that were introduced the session, less than half of them will make it into law. Who is really fishing here?

**Don't let the Utah Legislature try to run the state without you. Let your legislators know HB477 is bad government produced by a bad process, and the people of Utah deserve better.**

Utah Broadcast Association • Utahns for Ethical Government • Utahns for Open Government  
Utah League of Women Voters • Fox 13 News • KSL TV & Radio • KTVX • KUED • KUTV  
The Deseret News • The Ogden Standard-Examiner • The Provo Daily Herald  
The Salt Lake Tribune • and 59 member newspapers of the Utah Press Association

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# Mea Culpa

- Governor Calls Special Session
- Legislature Repeals HB 477

# GRAMA Practice Tips

- Compliance
- Transparency and accountability
- Minimize disputes

# No. 1: Make it easy on yourself



# No. 1: Make it easy on yourself

- Clarify ambiguous requests
- Discuss format
- Provide the record in electronic format
  - Maintained that way and is reproducible
  - Any non-public information can be redacted without undue expenditure (§ 201(12)).
- Refer the requester to your website
- Discuss fees

## No. 2: Require reasonable specificity

- “Reasonable specificity.” (§ 204(1)(b))

Example:

“All emails concerning the new Salt Lake City parking meters between 2012 to date.”

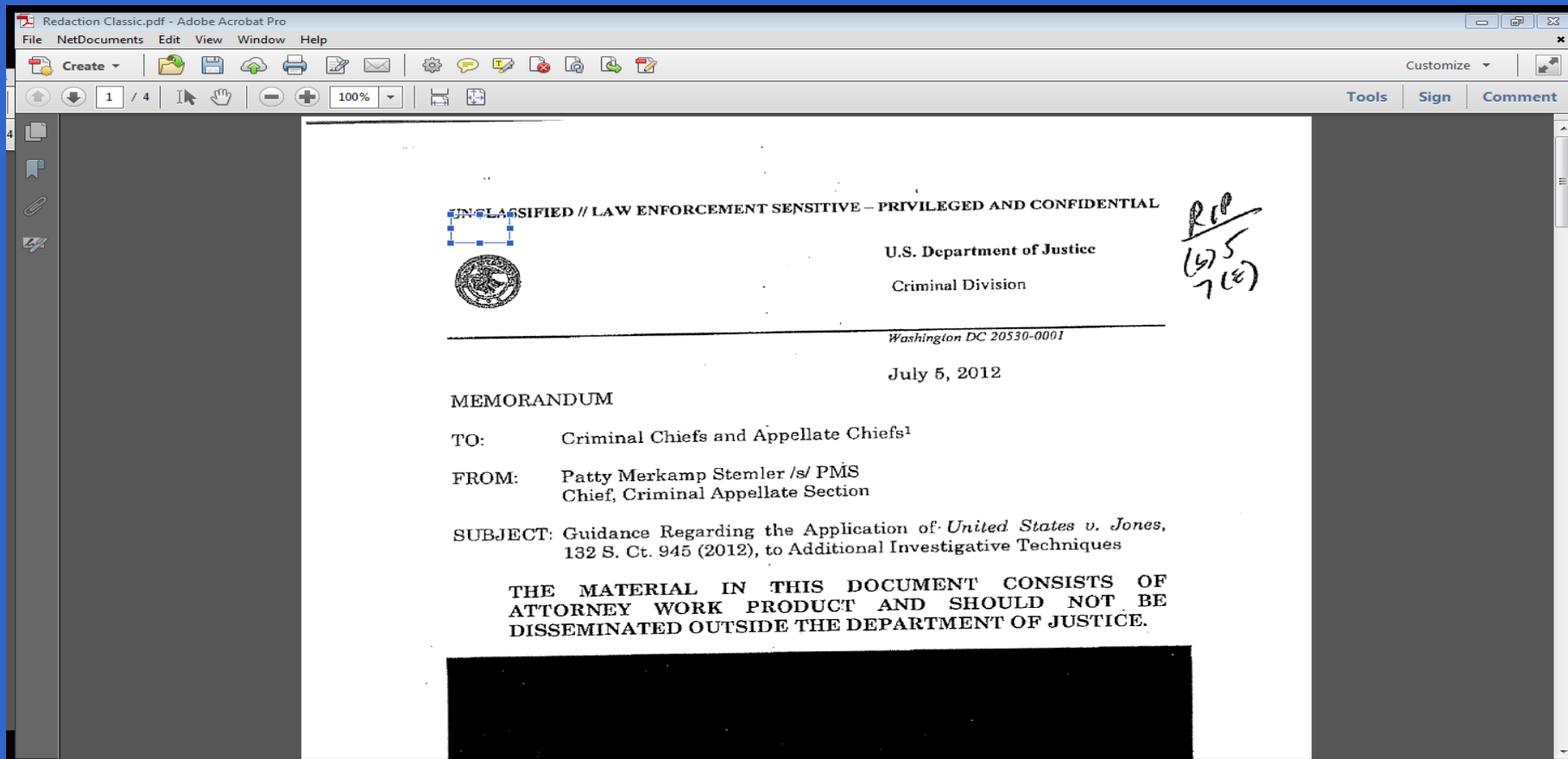
“All records, including emails, documenting complaints from users and others about the new Salt Lake City parking meters from their installation to date.”

# No. 3: Remember redaction

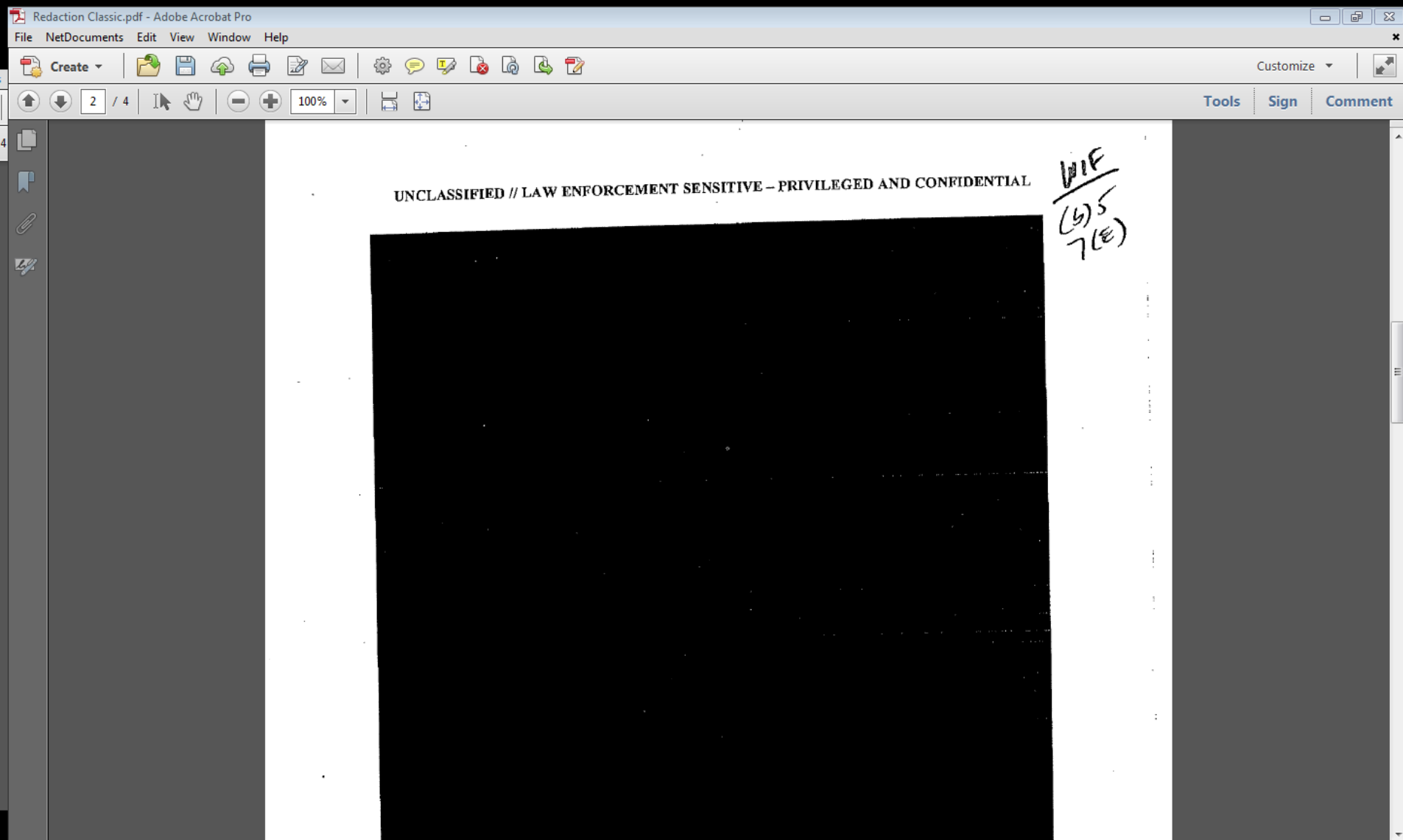
- Government has a duty to segregate public and non-public information in a record (§308)
- Examples:
  - Police reports
  - Investigative reports
  - Contracts



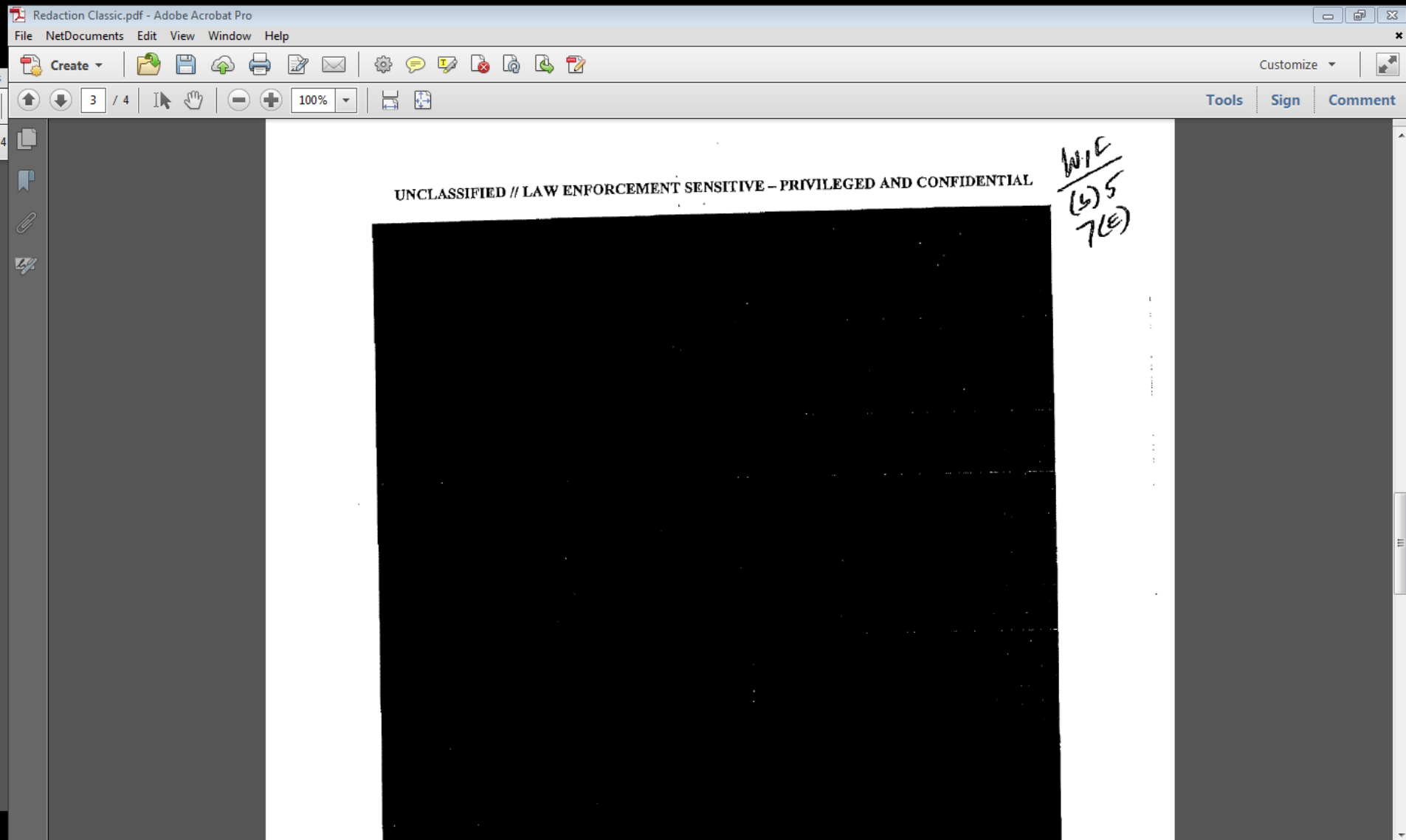
# Don't Get Carried Away



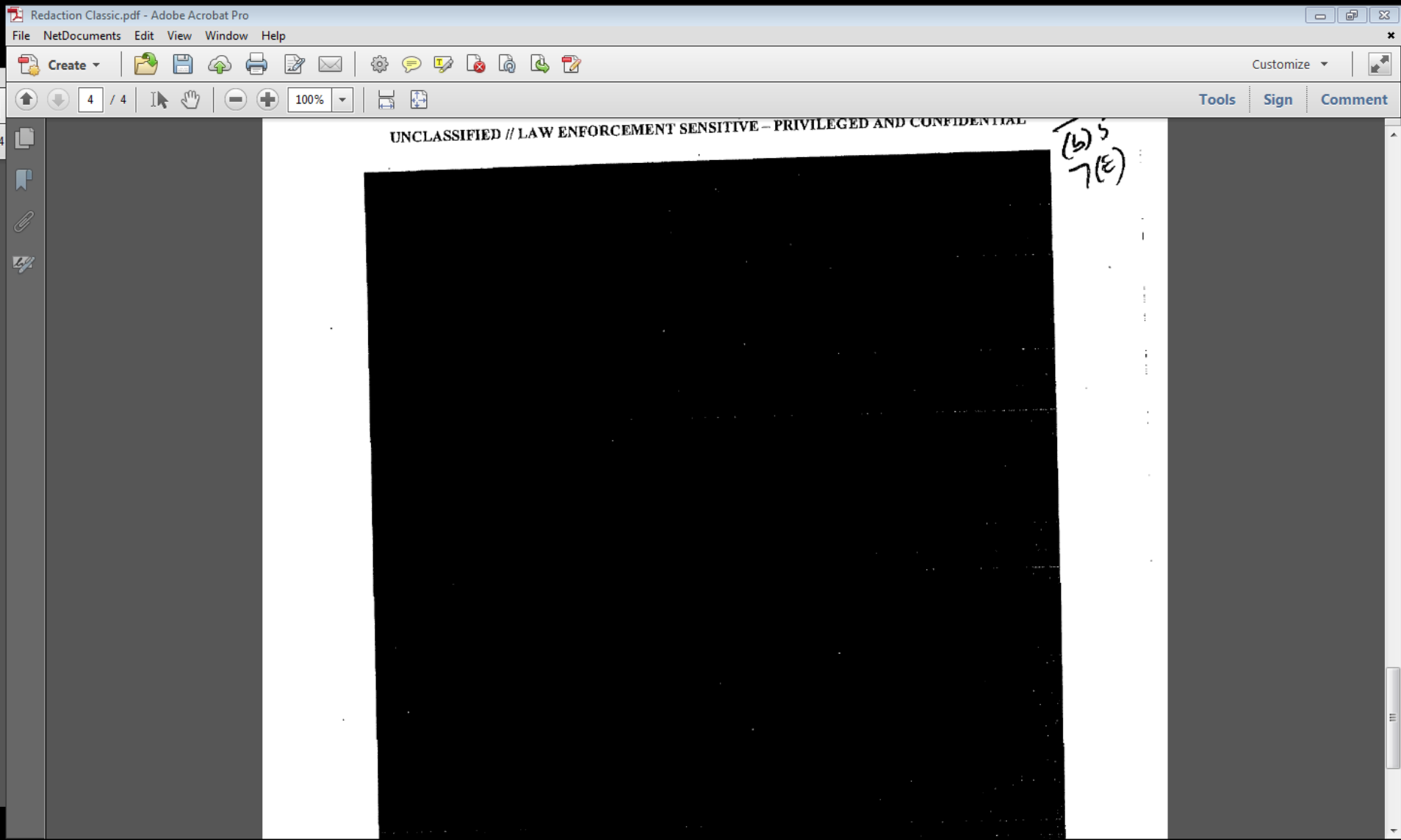
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# No. 4: Dealing with denial



# Dealing with denial

- Denials (§205)
  - describe the records or portions of records to which access was denied
  - citations to the specific statute, rule or regulation that exempt the record from disclosure
  - description of appeal procedure

# Dealing with denial

- Failure to respond within the statutory response time can be treated as a denial
  - 10 business days after receipt of written request
  - 5 business days for public interest requests (journalists)
  - Deadline may be extended for voluminous requests, segregation, legal review

# No. 5: It's all about the balance



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# It's all about the balance

- A government entity may release a record properly classified as private or protected if the interests favoring access are equal to or greater than those favoring restriction of access (§ 201(5)(b)).
- Orem City manager case
  - Six finalists
  - Names and resumes properly classified as private but public interest favored release

# No. 6: Content is king



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# Content is king

- Public access depends on the content, not form, of the record or where the record resides
- Record means “electronic data . . . that is prepared, owned, received or retained by a governmental entity” and is reproducible. (§ 103(22)).

# Content is king

- Government may “not use the physical form, electronic or otherwise, in which a record is stored to deny . . . the rights of a person to inspect and receive a copy of a record under this chapter.” (§ 201(11))
- Emails, text messages, and other forms of electronic communications are subject to GRAMA

**STONEBRIDGE  
CHURCH OF GOD**

**HONK IF YOU LOVE  
JESUS TEXT  
WHILE DRIVING IF YOU  
WANT TO MEET HIM**

**SUN. SCHOOL  
10:00 AM**

**SUN. WORSHIP  
11:00 AM & 6:00 PM**

**WED.  
7:00 PM**

*Pastor Floyd Ingram*

**WIN**

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# Maine Bans Texting to Conduct State Business

- Former executive branch employee testified she was encouraged to text when communicating about state business because the messages were harder to access under Maine's open records law
- Governor enacted ban on state employees using text messaging and personal email accounts to conduct state business

# No. 7: Presume access

- Remember the presumption of access to records
- All government records are presumed to be public unless expressly provided otherwise by statute (§ 201(2))
  - Presumption of access applies at all levels of appellate review, i.e., administrative and judicial (*Deseret News v. Salt Lake County*)
  - If interests favoring and disfavoring access are of equal weight, tie goes to access (*Id.*)

# *Deseret News v. Salt Lake County (Utah Supreme Court 2008)*



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# *Deseret News v. Salt Lake County* (Utah Supreme Court 2008)

- DA commissions independent investigative report of alleged sexual harassment by a county official
- Alleged victim files federal lawsuit
- County official resigns days before report submitted
- DA refuses to allow GRAMA appeal bodies to review the investigative report

# *Deseret News v. Salt Lake County*

## *(Utah Supreme Court 2008)*

- District Court: County properly classified report as private and protected
- Supreme Court: Reversed. Held:
- Investigative report is a public record
- Presumption of Public Access: Burden on governmental entity to demonstrate record is not public
- “When competing **interests** fight to a draw, disclosure wins”

# *Deseret News v. Salt Lake County*

- Administrative Reviews: default classification entitled to no deference
- Must consider changed factual circumstances, such as whether information is in the public domain

# *Deseret News v. Salt Lake County*

- Administrative Appeals:
  - “Conscientious and Neutral Evaluation”
  - “GRAMA does not contemplate adversarial combat over records requests. Instead it envisions an impartial, rational balancing of competing interests.”
    - Justice Nehring

# *Deseret News v. Salt Lake County*

- Private Records (“clearly unwarranted invasion of personal privacy” - § 302(2)(d)).
  - Requires balancing of privacy interests with interests favoring disclosure
  - Disclosure of intimate, embarrassing and humiliating information is not determinative – must be clearly unwarranted
  - Information already in the public record is relevant

# *Deseret News v. Salt Lake County*

- Protected Records (investigations exception - § 305(9))
  - No categorical application
  - Requires fact-specific review
  - Requires on-going investigation and showing of interference

# *Deseret News v. Salt Lake County*

- Even if a record is properly classified as private or protected, may still obtain access “if the interests favoring access are greater than or equal to the interests favoring restriction of access.” (§ 402(6)).
- “When competing interests fight to a draw, disclosure wins.”

# No. 8: Things you don't have to do!





# Things you don't have to do!

- Create a record
- Compile, format, manipulate, package or summarize
- Provide record in particular format
- Fulfill unreasonably duplicative requests from the same person
- Fulfill a request for information available on a government website or publication

§ 201(8)

# No. 9: A word about fees



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# A word about fees

- May charge a reasonable fee to cover “actual cost” of providing the record (§ 203(1))
- May charge search, retrieval, and direct administrative costs if request is for records compiled in a form other than that normally maintained by the entity.
- No charge for first 15 minutes of staff time

# Some things really are free

- No charge for inspection (§ 203(5))
- No charge for reviewing record to determine whether it is subject to disclosure. (*Id.*)
- Fee waivers encouraged for public interest requests (journalists)
- May provide electronic copy in lieu of paper (§ 201(12))

# No. 10: Make your appeals appealing

- *Deseret News v. Salt Lake County*:
  - No deference to non-public classification: “It would be incompatible with a governmental entity’s responsibilities under GRAMA to apply to a record request a review methodology which presumes that a requested record has been properly classified and then proceed to canvass GRAMA for statutory language that confirms its designation.”

# Make your appeals appealing

- *Deseret News v. Salt Lake County*:
  - No rubber-stamp administrative review: “Here, the County was required to conduct a conscientious and neutral evaluation of the report’s GRAMA status without regard to existing designations or classifications.”
  - (Appeals body should review the records at issue)

# Appeal to Court or State Records Committee

- Political subdivisions must establish their own administrative appeals process (§ 701(4)-(7))
- May provide a right of appeal to State Records Committee
- Records Committee: Hearing; no discovery; Committee may subpoena witnesses or documents; decision within 5 days
- Appeals from decisions of GRAMA appeals boards or the Records Committee are to District Court



# *Schroeder v. Utah Attorney General (Utah Supreme Ct.)*



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# *Schroeder v. Utah Attorney General (Ut. Supreme Ct.)*

- Access to bank records of Envision Ogden
- District Court: public release of bank records obtained pursuant to a lawful subpoena would constitute unreasonable search and seizure under Utah Constitution
- On appeal to Utah Supreme Court

# Open & Public Meetings Act



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# Utah



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# Presumption of Openness

- Presumption of Openness – Meetings are presumed open unless Act expressly allows or requires closure
  - Declaration of Public Policy – Government actions and deliberations are the people's business and should be conducted openly
  - Reasons for closure are permissive,

# Closure During a Meeting

- Closure procedure:
- Publicly announce and record in minutes the votes by name for closure, and location of closed meeting
- Cannot approve any ordinance, resolution, rule, regulation, contract, or appointment in closed meeting – must reconvene open meeting to record public vote

# Closure Procedure

- Cannot interview a person applying to fill an elected position
- Cannot discuss filling a midterm vacancy or temporary absence for an elected position

# Closure of Meetings

- Permissive Closure – Eight Reasons:
  - Character, competence, and health
  - Strategy sessions on collective bargaining, litigation, or real property
  - Deployment of security personnel, devices, or systems
  - Criminal investigations



# Closure of Meetings

- Legislative review of ethics complaints
- County legislative body discussion of “commercial information”
- Utah Higher Education Assistance Authority discussions of fiduciary or commercial information
- Certain procurement proceedings

# Notice

- Individual Meetings – Minimum of 24-hour notice of individual meeting must include agenda items, date, time and place

# Notice

- Posting written notice at the public body's office or meeting place;
- Posting on the Utah Public Notice Website ([www.utah.gov/pmn](http://www.utah.gov/pmn)); and
- Given to a local media correspondent or general circulation newspaper or allowing media to subscribe to receive updates posted on the Utah Public Notice Website

# Enforcement

It's you!



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# When in doubt, keep it open



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# Thank You



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